INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutory provisions involved	2
Statement	4
Argument:	
Introduction and summary	6
I. Racial discrimination in the sale of admissions to the Lake Nixon Club violates Section 1 of the Civil Rights Act of 1866 (now 42 U.S.C. 1981, 1982)	9
A. Section 1981, on its face, bars respondent's conduct	9
B. Section 1982, on its face, also bars respondent's conduct	13
C. Subsequent enactment of a public accommodations law in 1875 does not indicate that the rights claimed here were beyond the scope of the 1866 legislation	14
D. This Court's decision in the *Civil Rights Cases* is not a viable obstacle to our conclusion	19
E. The public accommodations law of 1964 does not affect the coverage of the 1866 act	22

333-097—69——1

Argument—Continued Page

II. The exclusion of petitioners, by reason of their race, from the enjoyment of the facilities of Lake Nixon Club violates Title II of the Civil Rights Act of 1964 27

A. Section 201(b)(4) brings Lake Nixon within the coverage of the 1964 act 28

B. Section 201(b)(3) brings Lake Nixon within the coverage of the 1964 act 34

Conclusion 40

Cases:

Amos v. *Prom, Inc.*, 117 F. Supp. 615 37

Bell v. *Maryland*, 378 U.S. 226 15, 21

Bolton v. *State*, 220 Ga. 632, 140 S.E. 2d 866 31

Civil Rights Cases, 109 U.S. 3 15, 19, 20, 21, 22

Clearfield Trust Co. v. *United States*, 318 U.S. 363 12

Coger v. *North West. Union Packet Co.*, 37 Iowa 145 16

Curtis Publishing Co. v. *Butts*, 388 U.S. 130 14

Donnell v. *State*, 48 Miss. 661 16

Drews v. *Maryland*, 381 U.S. 421 30

Erie R. Co. v. *Tompkins*, 304 U.S. 64 12

Evans v. *Laurel Links, Inc.*, 261 F. Supp. 474 29

Fazzio Real Estate Co. v. *Adams*, 396 F. 2d 146, affirming 268 F. Supp. 630 29

Ferguson v. *Gies*, 82 Mich. 358 16

Gray v. *Sanders*, 372 U.S. 368 34

Gregory v. *Meyer*, 376 F. 2d 509 31, 33

Hamm v. *City of Rock Hill*, 379 U.S. 306 14, 30, 31, 33, 37

Heart of Atlanta Motel v. *United States*, 379 U.S. 241 9, 21, 33, 37

Hodges v. *United States*, 203 U.S. 1 20

Cases—Continued

	Page
Howard v. *Lyons*, 360 U.S. 593	12
Jones v. *Mayer Co.*, 392 U.S. 409	7, 9, 11, 12, 13, 14, 16, 18, 20, 21, 22, 23, 24, 25, 37
Katzenbach v. *McClung*, 379 U.S. 294	40
Marrone v. *Washington Jockey Club*, 227 U.S. 633	11
Miller v. *Amusement Enterprises, Inc.*, 394 F. 2d 342, reversing 391 F. 2d 86	9, 35, 36, 39, 40
Nesmith v. *YMCA of Raleigh*, 397 F. 2d 96	9, 30
Newman v. *Piggie Park Enterprises, Inc.*, 377 F. 2d 433, affirmed as modified, 390 U.S. 400	30
Scott v. *Young*, 12 Race Rel. L. Rep. 428	29
Sullivan v. *Little Hunting Park*, 392 U.S. 657	14
Textile Workers v. *Lincoln Mills*, 353 U.S. 448	12
United States v. *All Star Triangle Bowl, Inc.*, 283 F. Supp. 300	29, 34
United States v. *Beach Associates, Inc.*, 286 F. Supp. 801	30, 34
United States v. *Fraley*, 282 F. Supp. 948	29
United States v. *Guest*, 383 U.S. 745	20
United States v. *Johnson*, 390 U.S. 563	27, 36
United States v. *Mosley*, 238 U.S. 383	17, 36
United States v. *Price*, 383 U.S. 787	17, 36
United States v. *Schooner Peggy*, 1 Cranch 103	14
United States v. *Standard Oil Co.*, 332 U.S. 301	12
United States v. *Williams*, 341 U.S. 70	17
Valle v. *Stengel*, 176 F. 2d 697, reversing 75 F. Supp. 543	12

Cases—Continued Page
Virginia, Ex Parte, 100 U.S. 339 15
Watkins v. *Oaklawn Jockey Club*, 86 F. Supp. 1006, affirmed, 183 F. 2d 440 11
Williams v. *Kansas City, Missouri*, 104 F. Supp. 848, affirmed, 205 F. 2d 47, certiorari denied, 346 U.S. 826 11
Willis v. *Pickrick Restaurant*, 231 F. Supp. 196; appeal dismissed, 382 U.S. 18 31
Wooten v. *Moore*, 400 F. 2d 239 ..... 31, 33
Constitution and statutes:
U.S. Constitution:
Thirteenth Amendment 14, 20, 21, 25
Fourteenth Amendment 15, 16, 17, 25
Civil Rights Act of 1866, Act of April 9, 1866, 14 Stat. 27:
Section 1 ..... 9, 10, 14, 15
Section 2 18
Enforcement Act of 1870, Act of May 31, 1870, 16 Stat. 140:
Section 16 10
Section 18 10
Civil Rights Act of 1875, Act of March 1, 1875, 18 Stat. 335:
Section 1 15
Section 2 ..... 15, 18, 19
Section 3 ..... 15, 19
Section 4 15
Section 5 15

Constitution and statutes—Continued Page
Civil Rights Act of 1964, Title II, 42 U.S.C. 2000a to 2000a–6:
Section 201(a), 42 U.S.C. 2000a(a)---- 3, 23, 27
Section 201(b), 42 U.S.C. 2000a(b)---- 2, 3, 6, 24, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39
Section 201(c), 42 U.S.C. 2000a(c)---- 3, 24, 30, 33, 34, 35, 36, 37, 39, 40
Section 201(e), 42 U.S.C. 2000a(e)---- 6, 28
Section 203(a), 42 U.S.C. 2000a–2(a)---- 27
Section 204(a), 42 U.S.C. 2000a–3(a)---- 24, 27
Section 204(d), 42 U.S.C. 2000a–3(d)---- 24
Section 206, 42 U.S.C. 2000a–5---- 24
Section 207(b), 42 U.S.C. 2000a–6(b)---- 25, 27
Title X, 42 U.S.C. 2000g *et seq.*:
Section 1001, 42 U.S.C. 2000g---- 24
Section 1002, 42 U.S.C. 2000g–1---- 24
Section 1003, 42 U.S.C. 2000g–2---- 24
Section 1004, 42 U.S.C. 2000g–3---- 24
Civil Rights Act of 1968, Title VIII, 82 Stat. 81, 42 U.S.C. 3601 *et seq*---- 23, 24
42 U.S.C. 1981 (R.S. 1977)---- 2, 6, 9, 10, 13, 14, 22, 23, 24, 25, 26
42 U.S.C. 1982 (R.S. 1978)---- 2, 9, 10, 13, 14, 23, 24, 25
18 U.S.C. 241---- 17
18 U.S.C. 242---- 17, 18
18 U.S.C. 243---- 15
Miscellaneous:
Congressional Globe, 39th Cong., 1st Sess.---- 7, 16
Congressional Globe, 42d Cong., 2d Sess.---- 16
2 Cong. Rec.:
p. 340---- 17
p. 4082---- 18

Miscellaneous—Continued Page
109 Cong. Rec. 3248 7
110 Cong. Rec.:
p. 4856 31
p. 6533 8
pp. 7398, 7402 38
pp. 7406–7407 29
pp. 13915, 13912 40
Flack, *The Adoption of the Fourteenth Amendment* (1908) 16
Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131 15
Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 16
Hearings on Civil Rights before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess. 8, 30
Hearings on H.R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess. 8, 29
Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess. 25, 30
H. Rep. No. 914, 88th Cong., 1st Sess. 29, 37
S. Rep. 872, 88th Cong., 2d Sess. 40
Webster's New Third International Dictionary 37

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 488

MRS. DORIS DANIEL AND MRS. ROSALYN KYLES,
PETITIONERS

v.

EUELL PAUL, JR., INDIVIDUALLY AND AS OWNER, OPERATOR OR MANAGER OF LAKE NIXON CLUB

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (A. 47–62) is reported at 263 F. Supp. 412. The majority and dissenting opinions of the court of appeals (A. 64–90) are reported at 395 F. 2d 118.

JURISDICTION

The judgment of the court of appeals (A. 91) was entered on May 3, 1968. A petition for rehearing *en banc* (A. 92–102) was denied on June 10, 1968 (A. 103). The petition for a writ of certiorari was filed on September 7, 1968, and granted on December 9, 1968 (A. 105). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 42 U.S.C. 1981 and 1982 guarantee to Negroes the right to purchase admission to a privately owned place of amusement, such as the Lake Nixon Club, which is open to white members of the general public.

2. Whether the Lake Nixon Club is subject to the proscriptions of Title II of the Civil Rights Act of 1964 under Section 201(b)(4) of the Act (42 U.S.C. 2000a(b)(4)) by reason of the operation on its premises of an eating facility which is itself covered under Section 201(b)(2) of the Act (42 U.S.C. 2000a(b)(2)).

3. Whether the Lake Nixon Club is a "place of * * * entertainment" within the meaning of Section 201(b)(3) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)(3)) and is thereby subject to the proscription of Title II of the Act.

STATUTORY PROVISIONS INVOLVED

Sections 1981 and 1982 of Title 42 of the United States Code provide in pertinent part:

> § 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *.
>
> § 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The relevant provisions of Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000 *et seq.*) are as follows:

> § 201(a) (42 U.S.C. 2000a(a)). All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> § 201(b) (42 U.S.C. 2000a(b)). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce * * *:
>
> * * * * *
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises * * *;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A) * * * (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.
>
> § 201(c) (42 U.S.C. 2000a(c)). The operations of an establishment affect commerce with-

333-097—69——2

in the meaning of this title if * * * (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) * * * there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States * * *.

STATEMENT

Lake Nixon Club is a privately owned place of amusement located about 12 miles west of Little Rock, Arkansas. Approximately 100,000 persons patronize Lake Nixon each year (A. 43). The entire establishment contains about 230 acres and includes facilities for swimming, boating, picknicking, sun bathing, miniature golf, and dancing (A. 28–30, 41). For the convenience of its patrons, Lake Nixon also maintains a snack bar on the premises which sells hamburgers, hot dogs, soft drinks, and milk purchased from local suppliers (A. 12–13, 30–32; see note 12, *infra*). Gross income from the sale of food was approximately $10,500 during the 1966 sea-

son, or about 23 percent of the total revenue for the entire establishment (A. 13, 63).

The district court took judicial notice of the fact that at least some of the ingredients of the bread products and soft drinks sold at Lake Nixon had moved in interstate commerce (A. 57). Fifteen paddle boats which were used on the Lake were rented on a royalty basis from an Oklahoma company (A. 28–29), and two juke boxes maintained on the premises were manufactured outside Arkansas (A. 62). Lake Nixon was advertised over a local radio station and in a monthly publication, designed to reach tourists and visitors, which listed available attractions in the Little Rock area (A. 55–56, see p. 32, *infra*). The district court found that although it is unlikely that an interstate traveler would break his trip to visit Lake Nixon, "it is probably true that some out-of-state people spending time in or around Little Rock" have patronized Lake Nixon (A. 56–57).

Lake Nixon has been operated as a racially segregated facility at least since respondent Euell Paul, Jr., and his wife purchased it in 1962 (A. 15, 41). Following the enactment of the 1964 Civil Rights Act, the Pauls began to refer to their establishment as a "private club" (A. 54). Patrons have thereafter been required to pay a 25-cent "membership" fee, which entitles them to enter the premises for an entire season, and, on payment of certain additional fees, to use the swimming, boating, and miniature golf facilities (A. 27–28). Although white persons are routinely admitted to membership in the Lake Nixon Club,

Negroes are uniformly denied membership or admission, because respondent feared that "business would be ruined" (A. 16, 44).

Petitioners, Mrs. Doris Daniel and Mrs. Rosalyn Kyles attempted to use the facilities of Lake Nixon on July 10, 1966, but were denied admission because they are Negroes (A. 37, 44). Petitioners thereafter instituted this class action against respondent, alleging that his policy of refusing Negroes admission to Lake Nixon was in violation of Title II of the Civil Rights Act of 1964 and of 42 U.S.C. 1981. In their complaint petitioners prayed for an injunction requiring respondent to abandon the recially discriminatory admission policy at Lake Nixon (A. 5).

Although finding that Lake Nixon was not a "private club" within the exemption for such facilities under Section 201(e) of the 1964 Civil Rights Act, the district court denied relief, holding that the Lake Nixon Club was not a covered establishment under either Section 201(b)(3) or 201(b)(4) of the Act (A. 57–62). A divided court of appeals affirmed on the ground that the evidence in the record failed to establish any connection between Lake Nixon and interstate commerce as required by the 1964 Act (A. 78). Neither the district court nor the court of appeals dealt with petitioners' claim under 42 U.S.C. 1981.

ARGUMENT

Summary and Introduction

The central issue in this case is whether an amusement facility open to the general public, may, consonant with the provisions of the Civil Rights Acts

of 1866 and 1964, exclude Negroes solely on the basis of their race. Our submission is that it may not, because the two statutes, sometimes overlapping, but complementary, combine to outlaw all such discrimination.

1. In 1866, Senator Trumbull of Illinois, Chairman of the Senate Judiciary Committee, dealing with one of the problems which confronted the "Reconstruction" Congress, spoke of the need to guarantee to the former Negro slaves, whose freedom had just been secured by the Thirteenth Amendment, the right "to make contracts and enforce contracts." Cong. Globe, 39th Cong., 1st Sess., 43. He described the bill he introduced on January 5, 1866—which later became the Civil Rights Act of 1866—as a measure designed affirmatively to secure for all men what he termed the "great fundamental rights," including the right "to make contracts" (*id.* at 475). With reference to the rights enumerated in the proposed legislation, the Senator said the bill would "break down all discrimination between black men and white men" (*id.* at 599). Speaking for this Court in 1968, Mr. Justice Stewart said that, indeed, the 1866 Act "was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * *." *Jones* v. *Mayer Co.*, 392 U.S. 409, 426. We submit that the right to purchase entry to, and to enjoy the benefits of, a place of public amusement is among the rights protected by the statute. (*Infra*, pp. 9–27.)

2. Addressing the Congress 97 years after Senator Trumbull, President Kennedy, in his message of February 28, 1963, said (109 Cong. Rec. 3248, emphasis added):

> No action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from * * * *recreational areas*, and other public accommodations and facilities.

To correct this injustice the President called for legislation "to secure the right of all citizens to the full enjoyment of all facilities which are open to the general public." (Hearings on Civil Rights before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., Part II, p. 1448 (Message of June 19, 1963)).

During the deliberations on the Administration's proposals, Representative Celler told the House Rules Committee that Title II "seeks to remove the daily affront and humiliation occasioned by discriminatory denials of access to facilities open to the general public." Hearings on H.R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess., p. 91. In the Senate, Senator Humphrey told his colleagues (110 Cong. Rec. 6533):

> The grievances which most often have led to protest and demonstrations by Negro Americans are the segregation and discrimination they encounter in the commonly used and necessary places of public accommodation * * *. No amount of oratory and quibbling can obscure the personal hardships and insults which are produced by discriminatory practices in these places. * * *
>
> * * * We must make certain that every door in our public places of amusement and culture is open to men of black skin as well as white.

> In sum, we must put an end to the shabby treatment of the Negro in public places which demeans him and debases the value of his American citizenship.

Title II of the 1964 Act, as finally passed, though not unlimited in its coverage, was a "most comprehensive" measure designed to achieve that end. See *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 246; *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342, 349, 352–353 (C.A. 5) (*en banc*); *Nesmith* v. *YMCA of Raleigh*, 397 F. 2d 96, 100 (C.A. 4). We believe it, too, encompasses the facility in suit. (*Infra*, pp. 27–40.)

I. RACIAL DISCRIMINATION IN THE SALE OF ADMISSIONS TO THE LAKE NIXON CLUB VIOLATES SECTION 1 OF THE CIVIL RIGHTS ACT OF 1866 (NOW 42 U.S.C. 1981, 1982)

A. SECTION 1981, ON ITS FACE, BARS RESPONDENT'S CONDUCT

Petitioners alleged in their complaint that respondent's refusal to admit them, by reason of their race, into membership in the Lake Nixon Club and to use its facilities deprived them of rights secured by 42 U.S.C. 1981, which provides, in pertinent part, that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *." We agree.

Whatever doubts may once have surrounded this provision were settled by this Court's decision, last Term, in *Jones* v. *Mayer Co.*, 392 U.S. 409, construing 42 U.S.C. 1982. Since both Section 1981 and Section 1982

derive from a single clause of Section 1 of the Civil Rights Act of 1866 (14 Stat. 27),[1] it seems evident the two provisions must be given comparable scope. Thus, like the right to "purchase [and] lease * * * real and personal property," the right to "make and enforce contracts" without discrimination on the basis of race is not limited to the legal capacity to engage in commercial transactions free from hostile state action. It, too, is an every-day right to equality of opportunity in business dealings—the "same right" as is enjoyed by white citizens—which the 1866 Act

[1] Section 1 of the Act of 1866 read as follows:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The "property" clause became separated when the rest of the provision, slightly expanded and made applicable to resident aliens as well, was re-enacted in *haec verba* as Section 16 of the Enforcement Act of May 31, 1870 (16 Stat. 140, 144). The property guarantee remained available to citizens alone as part of the 1866 Act, the whole of which was re-enacted (by reference only) by Section 18 of the Enforcement Act of 1870. This division was formalized in the Revised Statutes of 1874, the "property clause" being codified as Section 1978, the rest as Section 1977, and persists today in Sections 1982 and 1981 of Title 42 of the United States Code.

secures against racial discrimination by private persons as well as public authorities (392 U.S. at 421–424). Here, also, Congress meant exactly what it said—that it intended "to prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * *" (*id.* at 426, 436). And it would seem equally to follow that "the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment" (*id.* at 413). See discussion *infra*, pp. 19–21.

On its face, therefore, Section 1981 prohibits all private, racially motivated conduct which denies or interferes with the Negroes' right to enter into contracts to purchase that which is freely sold to white citizens. That membership in the Lake Nixon Club is a contractual relationship can hardly be denied. The record indicates that upon payment of the admittedly small membership fee, white persons (thereafter "members") obtained the right for the remainder of the season to enter onto the premises at no additional charge and, on payment of additional fees, to make use of Lake Nixon's amusement and entertainment facilities (A. 27–28). Even if the "membership" fee entitled a patron to admission on only one occasion, it is clear that under common law principles a ticket to a place of entertainment or recreation is regarded as a contract. *Watkins* v. *Oaklawn Jockey Club*, 86 F. Supp. 1006, 1016 (W.D. Ark.), affirmed, 183 F. 2d 440 (C.A. 8); *Williams* v. *Kansas City, Missouri*, 104 F. Supp. 848, 859 (W.D. Mo.), affirmed, 205 F. 2d 47, 51 (C.A. 8), certiorari denied, 346 U.S. 826. As Mr. Justice Holmes said in *Marrone* v. *Washington*

333-097—69——3

Jockey Club, 227 U.S. 633, 636, with reference to a ticket of admission to a race track, "the purchase of the ticket made a contract" and gave rise to a right "to sue upon the contract for the breach."[2]

It is of course unnecessary to decide here whether every transaction or relationship which could formally be characterized as "contractual" brings Section 1981 into play. Thus, it may well be that membership in a *bona fide* private club—not involved here (see p. 6, *supra*, and n. 10, *infra*)—and other purely social or personal arrangements are beyond the intended reach of the statute. Our present submission is only that ordinary commercial contracts are covered, including those relating to privately-owned places of *public* accommodation, which—except for the race barrier—admit all persons indiscriminately.

Indeed, that was the holding of *Valle* v. *Stengel*, 176 F. 2d 697 (C.A. 3), in which the plaintiffs sought damages and injunctive relief, alleging that certain individuals and police officers had discriminatorily refused to admit them to the swimming pool of an

[2] We do not consider whether an admission ticket is viewed as a contract under Arkansas law. In light of *Jones*, the federal courts will be called upon to develop a body of law as to what, for example, constitutes "property" under Section 1982 and "contracts" under Section 1981. That determination should not be made subject to the laws of the 50 State jurisdictions. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, notwithstanding, it is clear that in order that there be uniformity in the disposition of such matters as are within the area of federal legislative jurisdiction, the federal courts are authorized to develop federal law. *E.g.*, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457; *Howard* v. *Lyons*, 360 U.S. 593, 597. See also *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307.

amusement park in violation of rights secured to them by 42 U.S.C. 1981, 1982,[3] and the Fourteenth Amendment.[4] In reversing the district court's dismissal of the complaint (75 F. Supp. 543 (D. N.J.)), the court of appeals said (176 F. 2d at 702 (emphasis supplied.)):

> [Plaintiffs] were ejected from the park, were assaulted and were imprisoned falsely, as alleged in the complaint, because they were Negroes or were in association with Negroes, and *were denied the right to make or enforce contracts, all within the purview of and prohibited by the provisions of R. S. Section 1977* [42 U.S.C. 1981].

Here white members of the general public were allowed to make contracts giving them the right to enter and use Lake Nixon's facilities, while petitioners, Negroes, were denied that right. We believe that conduct constitutes a violation of Section 1981.

B. SECTION 1982, ON ITS FACE, ALSO BARS RESPONDENT'S CONDUCT

Although, in our view, the case is clearly embraced by Section 1981, we believe respondent's conduct also violates 42 U.S.C. 1982—the provision construed in *Jones* v. *Mayer Co., supra,* which guarantees all citizens, regardless of race, "the same right * * * to * * * purchase, lease * * * [and] hold * * * real

[3] Then 8 U.S.C. 41 and 42; Sections 1977 and 1978 of the Revised Statutes.

[4] Both the amusement park and the swimming pool located therein were private facilities open to the public upon the payment of an admission fee. Plaintiffs, Negroes and their companions, alleged that, although they were admitted to the park, they were denied entry to the swimming pool because of the application of a "white only" admission policy.

and personal property."[5] Indeed, nominal as it may be, the membership fee in Lake Nixon Club entitles the patron to enjoy the real and personal property of the facility. Whether the benefit is viewed as a kind of temporary lease or right of use appertaining to those properties, or as a species of incorporeal personalty, the transaction involves a "purchase."

We do not press the point. Our submission is simply that the case is covered by Section 1981 *or* Section 1982, if not both. Whatever may be the most appropriate characterization of the right to enjoy the benefits of the Lake Nixon facility, we have no doubt that a Negro who is excluded by reason of his race has suffered a loss of the freedom from racial discrimination secured by Section 1 of the Civil Rights Act of 1866. As the Court said in *Jones* (392 U.S. at 443), the Congress which acted to secure the Negroes' freedom under the Thirteenth Amendment to "go and come at pleasure" and to "buy and sell when they please" did exactly what it intended to do—"to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."

C. SUBSEQUENT ENACTMENT OF A PUBLIC ACCOMMODATIONS LAW IN 1875 DOES NOT INDICATE THAT THE RIGHTS CLAIMED HERE WERE BEYOND THE SCOPE OF THE 1866 LEGISLATION

What has been said sufficiently shows that the Civil Rights Act of 1866, on its face, reaches the discrim-

[5] Although petitioners did not plead 42 U.S.C. 1982 as a ground for relief, the Court may consider issues arising under that provision, *Curtis Publishing Company* v. *Butts*, 388 U.S. 130, 142–143; *Sullivan* v. *Little Hunting Park*, 392 U.S. 657, and decide the case on that basis. See *United States* v. *Schooner Peggy*, 1 Cranch 103, 110; cf. *Hamm* v. *City of Rock Hill*, 379 U.S. 306.

inatory policy of the Lake Nixon Club—whether under the "contract" clause of Section 1981 or the "property" clause of Section 1982. However, because we are dealing with a "place of public accommodation," which was the special subject-matter of the Civil Rights Act of 1875* (18 Stat. 335), held unconstitutional in the *Civil Rights Cases,* 109 U.S. 3, the question arises whether the right to equal enjoyment of such facilities must be deemed excepted from the coverage of the 1866 Act.

1. At the outset, we stress that there can be little doubt that the draftsmen of the 1866 Act believed they were reaching places of public accommodation. The 39th Congress, which passed the First Civil Rights Act and framed the Fourteenth Amendment, legislated against a background of common law rules affording members of the public not suffering from racial disability a legal right to use public conveyances and to obtain service in inns and hotels. See, *e.g.,* Frank and Munro; *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 149–153; *Civil Rights Cases,* 109 U.S. 3, 37–43 (Harlan J., dissenting); *Bell* v. *Maryland,* 378 U.S. 226, 295–299 (Goldberg, J., concurring). Accordingly, it may be supposed that the declaration of citizenship and of the right to make and enforce contracts in Section 1 of the Civil Rights Act was meant, at the least, to confer on Negroes the "same

*In speaking of the Civil Rights Act of 1875 we refer to Sections 1 and 2, which dealt exclusively with places of public accommodation. Section 4 of the Act, outlawing racial discrimination in jury selection, was vindicated in *Ex Parte Virginia,* 100 U.S. 339, and is today codified as 18 U.S.C. 243. Sections 3 and 5 were jurisdictional provisions, presumably applicable to the whole of the Act.

right" to the services of public accommodations as white citizens had enjoyed. Compare *Ferguson* v. *Gies*, 82 Mich. 358, 365; *Donnell* v. *State*, 48 Miss. 661. Indeed, opponents of the Freedmen's Bureau bill and the Civil Rights Act argued, without contradiction, that those measures would afford Negroes the right to equal treatment in places of public accommodation. See Cong. Globe, 39th Cong., 1st Sess., 541, 936; *id.* App. 70, 183 (Representatives Dawson and Rousseau, Senator Davis); *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 433, 435 n. 68. Presumably, the proponents of the Act offered no denial because they recognized that this was, indeed, one inevitable consequence of granting Negroes equality before the law, even in the narrowest sense. See *Coger* v. *North West. Union Packet Co.*, 37 Iowa 145 (1873); Flack, *The Adoption of the Fourteenth Amendment* 11–54 (1908). See also Supplemental Brief for the United States as *Amicus Curiae*, Nos. 6, 9, 10, 12, and 60, O.T. 1963, pp. 119–130.

This reach of the 1866 Act was made clearer by the re-enactment of the measure in 1870, after the adoption of the Fourteenth Amendment, which had confirmed the grant of citizenship to Negroes and explicitly guaranteed "equal protection of the laws." See *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 436–437. That understanding is reflected in the protracted congressional debates on the proposals which culminated in the Civil Rights Act of 1875, debates premised on the same concept of "civil" rights which underlay the declaration of rights in the 1866 Act. See Cong. Globe, 42d Cong., 2d Sess., pp. 381–383 (Senator Sumner); Gressman, *The Unhappy History of Civil*

Rights Legislation, 50 Mich. L. Rev. 1323–1336. There was, indeed, specific reference to an existing duty to afford Negroes equal treatment in places of public accommodation. As the Chairman of the House Judiciary Committee, Representative Butler of Massachusetts, told his colleagues, the bill which ultimately was enacted as the Civil Rights Act of 1875[1]—

> * * * gives to no man any rights which he has not by law now, unless some hostile State statute has been enacted against him. He has no right by this bill except what * * * every man * * * has by the common law and civil law of the country.

2. The question remains: If freedom from racial discrimination in places of public accommodation was already a federal right—secured by the Civil Rights Act of 1866, re-enacted in 1870—why then did Congress address itself to the subject again in 1875?

We might simply offer the short answer given for the Court by Mr. Justice Holmes in *United States* v. *Mosley*, 238 U.S. 383, 387, rejecting the argument that 18 U.S.C. 241 should not be read as reaching interference with voting rights because they were specifically dealt with elsewhere: "Any overlapping that there may have been well might have escaped attention, or if noticed have been approved." Redundancy is not rare in legislation of the period. See, *e.g.*, the overlap of Sections 241 and 242 of the Criminal Code as applied to rights protected by the Fourteenth Amendment, noticed in *United States* v. *Williams*, 341 U.S. 70, 78 (opinion of Frankfurter, J.), 88 n. 2 (opinion of Douglas, J.), and condoned in *United States* v.

[1] 2 Cong. Rec. 340.

Price, 383 U.S. 787, 800–806, 802 n. 11. This may be no more than another instance of duplication. But there is another explanation for the Civil Rights of 1875.

It is most likely, we think, that the 1875 law was enacted not to afford a new guarantee of equality in public accommodations, but to provide a more effective means, through federal enforcement, of vindicating rights which already had been recognized. The 1866 law provided no specific civil remedy for violation of the rights enumerated in Section 1, and its criminal provisions were applicable only to conduct done "under color of law." See Section 2 of the Act, now 18 U.S.C. 242. Negroes who were denied equal treatment in places of public accommodation were thus forced to seek redress under State law or through the uncertain remedies which might be available in the federal courts. See *Jones* v. *Mayer Co., supra*, 392 U.S. at 414 n. 13. The debates on the 1875 law demonstrated an awareness of the need for more effective enforcement of the right: "the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. When a man is traveling, and far from home, it does not pay to sue every innkeeper who, or railroad company which, insults him by unjust discrimination" (2 Cong. Rec. 4082 (Senator Pratt)).

The congressional response to this problem was the dramatically enlarged federal role assumed by Section 2 of the 1875 Act. Although earlier laws had confined criminal penalties for interference with civil rights (other than voting) to official conduct or conspiracies, Section 2 made it a federal offense (a mis-

demeanor) for *any person,* even acting privately and alone, to deny equal treatment in public accommodations. And Section 3 directed federal officials to initiate prosecutions under the Act. Section 2 also provided for a fixed penalty of $500 which the aggrieved person could recover from the violator in a civil action exclusively in a federal court. In short, the apparent purpose and effect of the Civil Rights Act of 1875 was to focus particularly on one of the many rights secured by the 1866 Act which was appropriate for especially stringent federal enforcement. That is, of course, a fully adequate basis for the enactment of supplementary legislation.

D. THIS COURT'S DECISION IN THE *CIVIL RIGHTS CASES* IS NOT A VIABLE OBSTACLE TO OUR CONCLUSION

A question remains whether the decision in the *Civil Rights Cases,* 109 U.S. 3, does not foreclose our conclusion that the Civil Rights Act of 1866 outlaws racial discrimination in places of public accommodations. There are two possible difficulties: the first premised on the holding that the Act of 1875 was unconstitutional; the second on the distinction drawn in the opinion between the 1875 Act and the Civil Rights Act of 1866.

1. Insofar as the *Civil Rights Cases* denied the power of Congress under the Thirteenth and Fourteenth Amendments to reach racial discrimination in privately owned places of public accommodation, we think it plain that the authority of that ruling has been eroded by later decisions. The underlying premise of the Fourteenth Amendment holding in the *Civil Rights Cases*—that legislation enforcing the Equal Protection Clause can only reach discriminatory con-

duct by persons invoking the shield of State law—was rejected by a majority of the Court in *United States* v. *Guest*, 383 U.S. 745, 762 (Clark, J., concurring), 781–784 (opinion of Brennan, J.). But, for present purposes, it is enough to notice that the narrow view taken in the *Civil Rights Cases* with respect to congressional power under the Thirteenth Amendment is inconsistent with *Jones* v. *Mayer Co.*, *supra*.

We recognize that the Court in *Jones* did not, in terms, overrule the Thirteenth Amendment holding of the *Civil Rights Cases*, there being no occasion to confront the ruling directly. See 392 U.S. at 441 n. 78. But the Court did expressly hold that Section 2 of the Thirteenth Amendment authorizes legislation which does more than merely restore legal capacity to former slaves. Thus, it was stated that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation" (392 U.S. at 440). Accordingly, the Court expressly overruled *Hodges* v. *United States*, 203 U.S. 1, a decision holding—on the authority of the *Civil Rights Cases*—that Section 1981 could not validly bar racial discrimination affecting a contract of employment (392 U.S. at 441–443 n. 78). And, in language fully applicable here, the Court broadly held (392 U.S. at 443):

> Negro citizens North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in

> the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. * * * [Notes omitted.]

The thrust of the *Jones* opinion, we submit, is that it is *not* "'running the slavery argument into the ground"—as the majority in the *Civil Rights Cases* supposed (109 U.S. at 24)—to concede congressional power to attempt to eradicate the vestiges of the slave system wherever they persist in the public life of the community. Whatever the validity in 1883 of viewing admission to places of public accommodations as a mere matter of "social rights" (109 U.S. at 22) and characterizing the discriminatory exclusion by the proprietor as involving only a discretionary decision "as to the guests he will entertain" (109 U.S. at 24), that approach does not conform to the present reality. Cf. the opinion of Mr. Justice Douglas, concurring, in *Bell* v. *Maryland*, 378 U.S. 226, 245–246, 252–283. In light of the old common law obligation, imposed on at least some operators of public accommodations, it is difficult to appreciate that the privilege of obtaining entry and service without arbitrary discrimination was ever a mere "social" matter. But, at all events, it is today more properly deemed a "civil right." Cf. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 251. In sum, we believe the constitutional power of Congress under the Thirteenth Amendment to reach racial discrimination in modern

places of public accommodations is no longer open to doubt.

2. We have already elaborated our view that the Congress of 1866 meant to outlaw the kind of discrimination revealed by this record. Even assuming the constitutionality of such an effort, however, the *Civil Rights Cases* may be invoked as apparently reaching the opposite conclusion, as a matter of statutory construction.

The objection, once again, is largely answered by the decision in *Jones* v. *Mayer Co.* Insofar as the prevailing opinion in the *Civil Rights Cases* characterizes the Civil Rights Act of 1866—in contrast to the Act of 1875—as merely removing legal "disabilities" (see 109 U.S. at 22), without in any way controlling the freedom of sellers to discriminate on racial grounds, that view has been squarely rejected by the Court. *E.g.*, 392 U.S. at 418–419, 436. And there is no better reason to accept the apparently equally narrow view of the "contract" clause espoused in that opinion. We add only that, assuming Section 1981 can properly be read as impliedly exempting certain personal transactions, and assuming further there was once a basis for considering the purchase of entry to a place of amusement as a purely "private" contract outside the scope of the provision, present circumstances would now justify treating such a transaction as a covered "public" contract.

E. THE PUBLIC ACCOMMODATIONS LAW OF 1964 DOES NOT AFFECT THE COVERAGE OF THE 1866 ACT

One final objection suggests itself: that enactment of the Civil Rights Act of that year (42 U.S.C. 2000a *et seq.*), in some way supersedes the provisions of the

1866 Act insofar as they deal with the same subject matter. Here, too, *Jones* v. *Mayer Co.* indicates the answer in rejecting a comparable argument premised on an interpretation of the Fair Housing Title of the Civil Act of 1968 (42 U.S.C. 3601 *et seq.*) as repealing or qualifying the "property" provision of the 1866 statute.

1. Of course, the understanding of the legislators of 1964 as to the intent of their predecessors a century earlier is only very remotely relevant. Certainly, it cannot override the clear indications given in 1866 and in 1875 that the original Civil Rights Act reached places of public accommodations. Accordingly, just as the Court did not look to the drafters of the Fair Housing Law of 1968 to determine the scope of Section 1982, here our construction of Section 1981 cannot be affected by the views prevailing in the 88th Congress. Nor is it even important to know what those views were: whether one assumes that the full scope of Section 1981 was or was not appreciated in 1964, it is clear that Title II of the Civil Rights Act of that year was not intended to repeal or supersede or amend the old statute.

2. We note first—as the Court did in *Jones* (392 U.S. at 413–417)—that there are substantial differences between the new law and the old. Title II of the 1964 Act prohibits discrimination on the basis of "race, color, religion, or national origin" (Section 201(a)), while 42 U.S.C. 1981 presumably is applicable only to race or color discrimination. Although Section 1981, on its face, prohibits all racially motivated denials of the right to enter into contracts, Title II applies only to certain types of establish-

ments having some nexus with interstate commerce (Sections 201(b), 201(c)). Section 1981 is couched in declaratory terms, without reference to any particular mode of enforcement, whereas Title II embodies a specific remedy provision (Section 204(a)). Significantly, the new law—unlike the old—expressly provides for enforcement at the instance of the Attorney General (Section 206), and the 1964 Act also created a Community Relations Service to assist in the private settlement of disputes relating to discriminatory practices (Title X, Sections 1001–1004, 42 U.S.C. 2000g–2000g–3). to which the courts may refer cases brought under Title II for the purpose of achieving voluntary compliance (Section 204(d)).

In many respects the differences are comparable to those between Section 1982 and the 1968 housing law which the Court noticed in *Jones*. Here, too, the old law is "a general statute applicable only to racial discrimination * * * and enforceable only by private parties acting on their own initiative," while the new legislation is a "detailed" and specialized enactment "enforceable by a complete arsenal of federal authority" (392 U.S. at 417). Accordingly, if we assume that the Congress of 1964 recognized the vitality and applicability of the Civil Rights Act of 1866—an assumption apparently indulged by the Court in *Jones* with respect to the drafters of the 1968 housing law—Title II can properly be viewed as special supplementary legislation, replacing the nullified Act of 1875, but leaving Section 1981 untouched.

3. It may be objected that our conclusion is sound only insofar as it focuses on those provisions of Title

II which *add* substantive guarantees or remedial machinery and ignores the fact that the new law in some respects *retrenches* on the broad coverage of Section 1981. The answer is that, confronted with the same situation with respect to the 1968 housing law, the Court in *Jones* did not on that account find a *pro tanto* repeal of Section 1982. The same result is compelled here.

There are of course many possible explanations for the limitations of the 1964 Act. Some were merely responsive to the Commerce Clause approach of the legislation and then prevailing constitutional doubts concerning the scope of congressional power under the Thirteenth and Fourteenth Amendments. Most likely, the full reach of Section 1981 in this area was not then appreciated.[8] But it does not follow that Section 1981 was repealed *sub silentio*. On the contrary, Title II expressly preserves pre-existing rights under federal law and that provision must of course be honored whether or not it was then recognized that Section 1981 was an operative statute with respect to public accommodations. Cf. *Jones* v. *Mayer*, *supra*, 392 U.S. at 437.

4. The savings clause is as follows (Section 207(b) of the Act, 42 U.S.C. 2000a–6(b)):

---

[8] 42 U.S.C. 1981 and 1982 were briefly noted in the hearings on the Civil Rights Act as at least prohibiting State-sanctioned discrimination in places of public accommodation (Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., p. 134 (Senator Prouty and Attorney General Kennedy)). It does not appear, however, that Congress understood those infrequently-used statutes to have the reach which has been confirmed by this Court's construction of 42 U.S.C. 1982 in *Jones*.

> * * * [N]othing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

It will be noticed that only rights under laws "not inconsistent" with Title II remain enforceable. That is no obstacle here, however. To the extent that Section 1981 prohibits racial discrimination by establishments which are not covered by Title II, it is not "inconsistent" with the 1964 Act in the ordinary sense that it contradicts the basic purpose of the new law; it obviously is designed to vindicate the same right. Moreover, the reference to State statutes and local ordinances makes it clear that a law with a more generous coverage was not "inconsistent" in the sense used here. For it goes without saying that Congress did not intend to invalidate State provisions which reach places of public accommodation left unregulated by the new federal law. It would be turning the statute on its head to read into it a purpose to confer on owners of non-covered establishments a federal right to practice racial discrimination, notwithstanding local legislation prohibiting it.

The conclusion that 42 U.S.C. 1981, which implements the Thirteenth Amendment, is repealed insofar as it applies to establishments not covered under Title II can rest only on the premise that Congress deliberately determined in 1964 that the Commerce Clause was to be the exclusive basis for *all* federal regulation

in respect of racial discrimination in public accommodations. There is no evidence of any such determination. Cf. *United States* v. *Johnson*, 390 U.S. 563, 566–567.* Nor is there any other indication that Congress meant to repeal the Civil Rights Act of 1866 in this respect. The result is that Section 1981 stands unimpaired.

II. THE EXCLUSION OF PETITIONERS, BY REASON OF THEIR RACE, FROM THE ENJOYMENT OF THE FACILITIES OF LAKE NIXON CLUB VIOLATES TITLE II OF THE CIVIL RIGHTS ACT OF 1964

Section 201(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(a)) guarantees to all persons, "without discrimination or segregation on the ground of race [or] color," "the full and equal enjoyment of the * * * services, facilities, privileges, [and] advantages * * * of any place of public accommodations." The Act prohibits any person from withholding or denying the right secured by Section 201, and authorizes an aggrieved party to institute a civil action for preventive relief (Sections 203(a) and 204(a), 42 U.S.C. 2000a–2(a) and 2000a–3(a)). Both the district court and the court of appeals held that petitioners were not entitled to relief under the 1964 Act because Lake Nixon Club is not a place of public accommodation as defined in Section 201. For the following reasons, however, we conclude that Lake Nixon is covered under either Section 201(b)(4) or Section

*We note that our interpretation of Section 207(b), since it relates to the enforcement by *individuals* of rights not specifically provided by Title II, is also fully consistent with the position taken in the dissenting opinion in *United States* v. *Johnson*, see 390 U.S. at 568 n. 1.

201(b)(3) of the Act (42 U.S.C. 2000a(b)(4), 42 U.S.C. 2000a(b)(3)).[10]

A. SECTION 201(b)(4) BRINGS LAKE NIXON WITHIN THE COVERAGE OF THE 1964 ACT

In addition to the specific types of establishments which are covered under Sections 201(b)(1) to 201(b)(3) if their operations affect commerce, Section 201(b)(4) extends the Act's prohibition against discrimination to any establishment which has a covered establishment located on its premises and which holds itself out as serving the patrons of the covered establishment. Respondent's testimony at trial showed that Lake Nixon maintained a snack bar for the convenience of patrons who used its other facilities. Thus, if the snack bar operation is covered under Section 201(b)(2), the entire establishment would be brought within the coverage of the Act. The district court held, however, that Section 201(b)(4) was inapplicable because Lake Nixon was a single enterprise whose principal business was the furnishing of recreational facilites, so that the snack bar could not be considered a separate establishment covered under the Act (A. 58).

The district court's ruling misconstrues Section 201(b)(4). Two of the major proponents of the bill explained to their colleagues in the House and Senate that a department store or other retail establishment

[10] This case does not present any question under the "private club" exemption of Section 201(e) of the Act (42 U.S.C. 2000a(e)). The district court found that Lake Nixon Club, despite its "membership" requirement, would not come "within the terms of any rational definition of a private club which might be formulated" under Section 201(e) (A. 57), and respondent did not challenge that finding on appeal.

which would not otherwise be covered would have to open "all its facilities" on a nondiscriminatory basis if it contained so much as a "lunch counter." Hearings on H.R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess., 92 (Representative Celler); 110 Cong. Rec. 7406–7407 (Senator Magnuson). See also H. Rep. No. 914, 88th Cong., 1st Sess., p. 20. In *Fazzio Real Estate Co.* v. *Adams*, 396 F. 2d 146 (C.A. 5), affirming 268 F. Supp. 630 (E.D. La.), the court of appeals enunciated the correct principle in holding that a refreshment counter located within a bowling alley could be considered a separate establishment itself covered under the Act for the purpose of applying Section 201(b)(4) to the entire establishment (396 F. 2d at 149):

> It is clear that the Act, for purposes of coverage, contemplates that there may be an "establishment" within an "establishment."
> * * * [I]f it be found * * * that a covered establishment exists within the structure of a unified business operation, then under the provisions of § 201(b)(4) of the Act the entire business operation located at those premises becomes a "covered establishment." The Act draws no distinction with regard to the principal purpose for which a business enterprise is carried on.[11]

[11] Accord, *Scott* v. *Young*, 12 Race Rel. L. Rep. 428 (E.D. Va.) (recreational area-eating facility); *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474 (E.D. Va.) (golf course-eating facility); *United States* v. *All Star Triangle Bowl, Inc.*, 283 F. Supp. 300 (D. S.C.) (bowling alley-eating facility); *United States* v. *Fraley*, 282 F. Supp. 948 (M.D. N.C.) (tavern-eating facility);

See *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 309, where this Court held that a lunch counter in a department store which was operated as an adjunct to the main business of the store was a covered establishment within the contemplation of the Act.

There is no doubt on this record that the Lake Nixon snack bar is a "facility principally engaged in selling food for consumption on the premises" under Section 201(b)(2) (A. 32; see *Newman* v. *Piggie Park Enterprises, Inc.*, 377 F. 2d 433 (C.A. 4) (*en banc*), modified as to other issues and affirmed, 390 U.S. 400). It is a covered establishment if its operations affect commerce, *i.e.*, if it "serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce" (Section 201(c)(2)). The court of appeals held that the Lake Nixon snack bar failed to satisfy either standard (A. 74–78).

In our view, the record establishes that the Lake Nixon Club (which, for this inquiry, is congruent with its snack bar) "offers to serve interstate travelers" within the meaning of Section 201(c)(2).[12] The court

---

United States v. *Beach Associates, Inc.*, 286 F. Supp. 801 (D. Md.) (bathing beach-eating facility and tourist cottages). See also *Drews* v. *Maryland*, 381 U.S. 421, 428 n. 10 (Warren, C.J., dissenting), and Judge Heaney's dissent in the instant case (A. 82–86). Compare *Nesmith* v. *YMCA of Raleigh*, 397 F. 2d 96, 100 (C.A. 4) (dictum).

[12] On this analysis, it is unnecessary to consider whether a substantial portion of the food or its ingredients moved in commerce. However, we note that the district court took judicial notice that the principal ingredients of the bread products used and some ingredients in the soft drinks probably originated outside of Arkansas (A. 57). The use of the word "substantial" in the statute was intended to mean only that something "more than just [a] minimal," or more than a "*de minimis*" amount of the food had moved in commerce. See Hearings on

of appeals relied on the district court's finding that "there was no evidence that the Lake Nixon Club has ever tried to attract interstate travelers *as such*" (A. 74, 56, emphasis added). But we can find nothing in the legislative history of the Act to indicate that the "offers to serve" provision was intended to mean less than what it says and to apply only to those establishments which actively solicit the business of interstate travelers. Such a limited construction was implicitly rejected by this Court in *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 309, where, although coverage under the Act does not appear to have been seriously disputed, the Court found an offer to serve interstate travelers in the fact that the lunch counter was located in a retail store that "invites all members of the public into its premises to do business." In *Gregory* v. *Meyer*, 376 F. 2d 509, 510 (C.A. 5), the court, in finding that a restaurant offered to serve interstate travelers, stressed the fact that "customers were not questioned as to tourist status, and that tourists were not rejected as customers." See also *Bolton* v. *State*, 220 Ga. 632, 140 S.E. 2d 866. And in *Wooten* v. *Moore*, 400 F. 2d 239, 242 (C.A. 4), the court cited a restaurateur's "readiness to serve white strangers without interrogation concerning their status" as evidence that he offered to serve interstate travelers, notwithstanding the fact that he had posted a sign on the door stating

---

Civil Rights before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., Part II, pp. 1384, 1386 (Attorney General Kennedy); Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., pp. 172, 212 (Attorney General Kennedy and Assistant Attorney General Marshall); 110 Cong. Rec. 4856 (Senators Humphrey and Sparkman); *Willis* v. *Pickrick Restaurant*, 231 F. Supp. 396, 403 (N.D. Ga.), appeal dismissed, 382 U.S. 18; *Gregory* v. *Meyer*, 376 F. 2d 509, 511 (C.A. 5).

that the restaurant did not "cater to interstate patrons."

In the present case, the district court found that Lake Nixon was "open in general to all of the public who are members of the white race" (A. 57). When questioned about his admission policies at trial, respondent did not advert to any policy of excluding interstate travelers or any practice of questioning patrons to determine whether they were out-of-state residents (see A. 20–21). And as Judge Heaney noted in his dissent below (A. 88 n. 9), respondent's advertisements did not suggest that interstate travelers would not be admitted; nor did the membership cards require an applicant to state his address. In addition, respondent inserted advertisements for Lake Nixon in periodicals which were intended to reach interstate travelers: the "Little Rock Air Force Base," a monthly newspaper published at the base, and "Little Rock Today," a monthly magazine listing available attractions in the Little Rock area (A. 55–56; see petitioners' Petition for Rehearing *en banc* in the court below, A. 92, 96, which quotes from the masthead of the May 1968 edition of "Little Rock Today": "Published monthly and distributed free of charge by Metropolitan Little Rock's leading hotels * * * motels and restaurants to their guests, new comers and tourists * * *."). Although these advertisements were directed to "members" of Lake Nixon, there is little reason to assume, as Judge Heaney realistically observed, that travelers would be less likely than residents of the Little Rock area to understand that the "membership" device was used

solely to exclude Negroes from the publicly advertised facilities (A. 89).

The fact that Lake Nixon, unlike the restaurants in *Gregory* and *Wooten,* is not located on an interstate highway does not justify disregarding the other evidence that respondent offered to serve interstate travelers. Lake Nixon is not "some isolated and remote lunchroom" (*Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 275 (concurring opinion of Mr. Justice Black)), which Congress' regulatory power under the Commerce Clause could reach only with evident strain. It is a large and profitable establishment which, Mrs. Paul testified, serves about 100,000 patrons each season (A. 43). An offer to serve such a large segment of the public without inquiry as to the residence of customers, under circumstances which make it reasonable to assume that some interstate travelers have accepted the offer, constitutes a sufficient connection with interstate commerce to support coverage of the establishment under Sections 201(b)(2) and 201(c)(2). See *Hamm* v. *City of Rock Hill,* 379 U.S. 306. Here, the offer to serve and the likelihood of actual service were so clear that the district court stated that "it is probably true that some out-of-state people spending time in or around Little Rock have utilized [Lake Nixon's] facilities" (A. 57).

In the light of the foregoing appraisal of the evidence, the failure of both courts below to find that the Lake Nixon snack bar offered to serve interstate travelers reflects an unduly restrictive construction of Section 201(c)(2) which deprives the Act of its intended scope. We conclude that the evidence demon-

strated that the snack bar was a covered establishment under Section 201(b)(2) and 201(c)(2) and, consequently, that the entire Lake Nixon Club was covered under Section 201(b)(4).[13]

B. SECTION 201(b)(3) BRINGS LAKE NIXON WITHIN THE COVERAGE OF THE 1964 ACT

Taken together, Sections 201(b)(3) and 201(c)(3) include within the Act's proscription of discrimination "any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment" which "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." The district court rejected petitioners' claim for relief under Section 201(b)(3) on the ground that the

[13] Though a decision reversing and remanding on the basis of Section 201(b)(4) would dispose of this case, we note that an order grounded only upon that section may be circumvented by respondent if he is prepared to remove all vestiges of the eating facility from the Lake Nixon premises. We stress, however, that mere closing of the eating facility at any time prior to the entry of an order by the district court upon remand should not be sufficient ground for dismissing the action as moot. The closing of the snack bar at this date would be for the purpose of defeating coverage. So long as the facilities for preparing and serving food remain on the premises they may be opened and put into use. Thus, unless the entire snack bar and all its facilities are totally removed from the Lake Nixon premises, the case could not be rendered moot under Section 201(b)(4). *Gray* v. *Sanders*, 372 U.S. 368, 376; *United States* v. *All Star Triangle Bowl, Inc.*, 283 F. Supp. 300, 302–303 (D. S.C.); *United States* v. *Beach Associates, Inc.*, 286 F. Supp. 801, 808 (D. Md.). Yet, respondent might well choose to take that step. Therefore, a determination of coverage under Title II should not in this case be rested upon Section 201(b)(4) alone.

"other place[s] of * * * entertainment" covered by the statute included only establishments where patrons were "edified, entertained, thrilled, or amused in their capacity of spectators or listeners" (A. 59). Alternatively, the court held that even if Lake Nixon were considered a place of entertainment, its operations did not affect commerce under Section 201 (c)(3) because the juke boxes, records, boats, and other amusement apparatus which respondent obtained from outside the State were no longer moving in interstate commerce (A. 61–62). The majority on the court of appeals affirmed, substantially on the grounds stated by the district court (A. 78–79, 81).

The decisions below are in conflict with the decision of the Court of Appeals for the Fifth Circuit *en banc* in *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342, which reversed the ruling of a divided three-judge panel (391 F. 2d 86) that Section 201 (b)(3) did not cover a private amusement park which offered mechanical rides and an ice skating rink to white patrons. The full court held that a place of entertainment within the meaning of Section 201 (b)(3) included "both establishments which present shows, performances and exhibitions to a passive audience and those establishments which provide recreational or other activities for the amusement or enjoyment of its patrons" (394 F. 2d at 350). The court also concluded that "sources of entertainment" within Section 201(c)(3) include the equipment and apparatus used by the patrons of such an establishment, as well as the patrons themselves, who provide entertainment for those who come only to watch others

enjoy the park's facilities (*id.* at 349, 351). The court further held that the use of the term "move in commerce" in Section 201(c)(3) was not intended to exclude sources of entertainment, such as equipment, which *had moved* in interstate commerce but which had come to rest on the premises of the entertainment establishment (*id.* at 351–352).

In a lengthy memorandum submitted at the request of the panel which rendered the initial decision in *Miller* (printed as an appendix to the panel's opinion, 391 F. 2d 86, 89–96), the government analyzed the relevant portions of the legislative history of Sections 201(b)(3) and 201(c)(3) and advised the court that the history was "inconclusive" as to the question whether Congress intended to restrict coverage under those sections to places which offer performances for spectator audiences. We believe that is a correct statement. But it does not follow that the scope of the provision should be limited to what Congress undoubtedly meant to encompass. On the contrary, in the absence of a discernible legislative intent to restrict coverage to a certain class of entertainment facilities, we think the full court of appeals on rehearing in *Miller* correctly determined to give full effect to the statutory language according to its common understanding, so as not "to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords"—to borrow the language of Mr. Justice Holmes, speaking for the Court in a related context (*United States* v. *Mosley*, 238 U.S. 383, 388). See also *United States* v. *Price*, 383 U.S. 787, 801; *United States* v. *Johnson*,

390 U.S. 563, 566–567; *Jones* v. *Mayer Co.*, 392 U.S. 409, 421, 437; *Amos* v. *Prom, Inc.*, 117 F. Supp. 615, 624 (N.D. Iowa).

To carve from Section 201(b)(3) an exception for Lake Nixon and similar establishments would violate the overriding purpose of Title II: "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." H. Rep. No. 914, 88th Cong., 1st Sess., p. 18. See *Heart of Atlanta Motel* v. *United States, supra,* 379 U.S. at 245–246, 291–292 (Goldberg, J., concurring); *Hamm* v. *City of Rock Hill, supra,* 379 U.S. at 315–316. We turn, then, to the statutory words which the courts below construed narrowly: "entertainment" in Section 201(b)(3) and "move" in Section 201(c)(3).

1. The dictionary defines "entertainment" as "the act of diverting, amusing, or causing someone's time to pass agreeably: [synonymous with] amusement" (Webster's Third New International Dictionary 757). No distinction is made between that which amuses or diverts one as a spectator or as a participant. Recreational activities such as swimming, boating, miniature golf, picnicking, and dancing—all offered at Lake Nixon—unquestionably amuse, divert, or agreeably engage a participant's attention; so also may sunbathing on a beach or watching others engage in the activities available at Lake Nixon. Indeed, respondent himself advertised over a local radio station that "Lake Nixon continues their policy of offering you year-round entertainment" (A. 88 n. 10).

Absent a clear showing that Congress intended to exclude establishments which offered such diversions

to the general public, to hold that the Lake Nixon Club is not a place of entertainment within the meaning of Section 201(b)(3) would violate the basic canon of statutory construction that the words of a law are presumed to be used in their ordinary and usual sense. Moreover, the facts of this case illustrate the precise problem which Congress considered in respect of its power to regulate interstate commerce. As Senator Magnuson, the floor manager of Title II, told the Senate (110 Cong. Rec. 7398, 7402):

> Discriminatory practices in places of amusement * * * often leads [sic] to the withholding of patronage by those affected, and in that way the normal demand for goods or entertainment is restricted. * * *
>
> * * * * * *
>
> These principles are applicable not merely to motion picture theaters but to other establishments which receive supplies, equipment or goods through the channels of interstate commerce. If these establishments narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and, therefore, the volume of interstate purchases will be less.

In light of those concerns, it is most doubtful that Congress contemplated that an establishment like Lake Nixon, comprising several hundred acres of facilities and catering to about 100,000 patrons each season, would not be considered a place of entertainment despite the size of its market for interstate business.

We therefore conclude that the Lake Nixon Club is a place of entertainment within the meaning of Section 201(b)(3). That result is fairly comprehended by the language of the statute and is fully consistent with the spirit of the law. As the Fifth Circuit explained in its *en banc* opinion in *Miller*, to hold that this type of establishment is not covered by the Act "would be an injustice, and would be to pay homage to that same inequality which the laws of our land, the Congress in enacting them, the courts in interpreting them, and executive branch in its enforcement efforts have strived to eradicate" (394 F. 2d at 353).

2. The record clearly establishes that the operation of Lake Nixon affected commerce within the meaning of Section 201(c)(3). The district court found that Lake Nixon offers to serve the general public and that it is reasonable to assume that some interstate travelers, who may be viewed as providing entertainment for other patrons, have made use of its facilities (A. 57). The court also found that the juke boxes and some of the records, which furnished music for listening or dancing, were manufactured outside of Arkansas (A. 62), and the fifteen paddle boats which respondent rented for use on the lake were leased on a royalty basis from an Oklahoma company (A. 28–29; see A. 62, 90). Both courts below disregarded evidence of the interstate origin of these mechanical sources of entertainment because of their view that Section 201(c)(3) required a showing that the persons or products were continuously *moving* in interstate commerce. As shown above (p. 38, *supra*), however, Con-

gress was also concerned with the impediments which discrimination imposed on interstate commerce in entertainment equipment and supplies, which would usually be retained by the purchaser or lessee. Congress' determination to include such products within the operation of Section 201(e)(3) is demonstrated by the fact that it rejected an amendment to that section which would have required that the source of entertainment had "not come to rest within a state." 110 Cong. Rec. 13915, 13921. See S. Rep. No. 872, 88th Cong., 2d Sess., p. 3; *Miller* v. *Amusement Enterprises, Inc., supra,* 394 F. 2d at 351–352; cf. *Katzenbach* v. *McClung,* 379 U.S. 294, 302.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and the cause remanded for the entry of an appropriate order.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
JOSEPH J. CONNOLLY,
Assistants to the Solicitor General.

GARY J. GREENBERG,
Attorney.

FEBRUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969